In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-52

ARTHUR THEODORE TAITANO AND
JANE K. FUJIWARA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1971. On June 2, 1971, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to July 10, 1971, and the petition

was filed on July 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the prosecutor's statements that the government's evidence was uncontradicted violated petitioners' Fifth Amendment rights.

2. Whether the term "law of the United States" as used in 18 U.S.C. 1952(b)(1) includes the penal laws of Guam.

STATEMENT

After a jury trial in the United States District Court for the District of Guam, petitioners were convicted of knowingly enticing and transporting women from Honolulu to Guam for the purposes of prostitution, in violation of 18 U.S.C. 2421 and 2422, and of transportation in aid of racketeering enterprises, in violation of 18 U.S.C. 1952. Petitioners were charged in a multi-count indictment with transportation on separate occasions in 1968 and 1969. Petitioner Taitano was found not guilty on the counts relating to the 1969 occurrence and guilty on all counts relating to the 1968 incident. Petitioner Fujiwara was found guilty of all counts pertaining to both incidents. Each petitioner was fined $3,000 and sentenced to concurrent two-year terms of imprisonment for each count under Section 2421. Similar terms were imposed for each count under Section 2422. The sentences imposed under Section 2422 were to run consecutively to the sentences under 2421. For the counts under Sec-

tion 1952 for which they were found guilty, they each received suspended concurrent two-year sentences and a two-year probation period beginning upon release from prison. The court of appeals affirmed (Pet. App. A).

The government's case consisted primarily of the testimony of four women, named in the indictment, who testified that petitioners induced them to come to Guam to engage in prostitution and arranged transportation for them. Two of the women testified that in September, 1968, they met petitioners at an apartment in Honolulu to discuss arrangements. In September, 1969, Fujiwara met in Honolulu with two other women and made similar arrangements. On both occasions, individuals other than the petitioners and the four women were present.

Petitioners' defense consisted of the testimony of four men, including the Attorney General of Guam and two Guam legislators, who denied that they had ever had sexual intercourse with any of government's witnesses, as those witnesses had testified.

In his closing argument, the prosecutor made several references (Pet. App. C) to the fact that the government's evidence was uncontradicted. The court of appeals rejected petitioners' contention that this amounted to improper comment on their failure to testify in their own behalf. While generally disapproving the type of argument employed by the prosecutor, it held that the prosecutor's remarks were not prejudicial. The court noted that counsel for petitioners had not objected to the closing argument, and found that any possible prejudice was cured by the

trial judge's instruction to the jury on the petitioners' constitutional right not to testify. Finally, the court concluded that 18 U.S.C. 1952 proscribed interstate or foreign travel involving violations of the Guam penal laws.

ARGUMENT

1. Contrary to petitioners' contention (Pet. 11-15), there is no conflict among circuits as to the test used to determine whether a prosecutor's argument to the jury constitutes an impermissible comment on the failure of a defendant to testify in his own behalf. The test applied by the court below was that which it had set forth in *Hayes* v. *United States*, 368 F.2d 814, 816—whether "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." This same test is applied in other circuits. See, *e.g.*, *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (C.A. 2), certiorari denied, 397 U.S. 1050; *Davis* v. *United States*, 357 F.2d 438, 441 (C.A. 5), certiorari denied, 385 U.S. 927; *United States* v. *Lyon*, 397 F.2d 505, 509 (C.A. 7), certiorari denied *sub nom. Lysczk* v. *United States*, 393 U.S. 846; *Knowles* v. *United States*, 224 F.2d 168, 170 (C.A. 10). We do not understand petitioners to challenge the test applied (see Pet. 13), but instead only to complain of the result reached on the facts of this case.

The prosecutor's closing argument (see excerpts at Pet. App. C) was directed to the fact that the defense testimony in no way related to the conversa-

tions concerning the arrangements for sending the girls to Guam, but only to the girls' testimony regarding specific acts of prostitution in Guam. The former was the central basis of the government's case, which charged petitioners with enticing and transporting prostitutes to Guam. In view of the testimony that persons other than petitioners and the prostitutes were present at the meetings in Honolulu, who presumably could have challenged the government's evidence on this matter, the prosecutor's references were legitimate comments on the evidence. Repetition of them did not, without more, convert them into comments on the failure of the petitioners to testify. The references to petitioners (see Pet. App. C, pp. 2 and 4) were in this context, and concerned only petitioners' failure to proffer any rebuttal testimony on the critical issues. Nor was there any impropriety in the prosecutor's reference to the invoking of the privilege against self-incrimination (Pet. 7). This was clearly directed to the use of that privilege by government witnesses,[1] and emphasized that the right to invoke it is an absolute right under our system. Finally, any possible prejudice to petitioners was eliminated by the trial judge's instruction that petitioners had a constitutional right not to testify and that no inference should be drawn from their failure to testify (Tr. 584), and that petitioners had no duty to present any evidence but could rely on the insufficiency of the government's evidence (Tr. 519).

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[1] The privilege was invoked by seven witnesses, five of whom were granted immunity (see Pet. 13, n. 6).

The cases petitioners cite as conflicting with the decision below turn on the particular facts involved, in each instance significantly different from the present case. For example, in *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (C.A. 1), the defendant was the only person who could contradict the government's evidence. In this circumstance, the prosecutor's comment that the evidence was uncontradicted was held to be an impermissible comment on the failure of the defendant to testify. In *Doty* v. *United States*, 416 F.2d 887 (C.A. 10), certiorari granted and judgment vacated *sub nom. Epps* v. *United States*, 401 U.S. 1006, where only two of the eight defendants chose to testify, the prosecutor in his closing arguments stated that the evidence was uncontradicted only as to the defendants who did not testify. The court of appeals applied the *Hayes* test and held that the prosecutor's argument amounted to a comment on the failure of those defendants to testify. These decisions make clear that determination of whether prosecutorial arguments that the government's evidence is uncontradicted constitute comments on the failure of defendants to testify presents a factual issue to be determined in the context of each case.

2. Petitioners contend (Pet. 16-18) that the court below incorrectly held that prostitution in violation of the Guam penal laws is an "unlawful activity" within the meaning of 18 U.S.C. 1952(b)(1). Congress, in enacting the anti-racketeering provisions of Section 1952, sought to prohibit travel in interstate commerce in aid of racketeering enterprises, such as prostitution, but did not wish to interfere with the

right of each local jurisdiction to define for itself what constitutes illegal activity (such as prostitution, gambling, etc.). That Congress intended Section 1952 to apply to Guam is made clear by the statutory definition of interstate commerce (18 U.S.C. 10), which includes travel from a state to a territory. Moreover, the definition of "United States" in 18 U.S.C. 5 [2] shows that the term "laws of the United States" as used in Section 1952 includes the penal laws of Guam. This reading of the statute by the court below accords to Section 1952 an interpretation consistent with the legislative intent.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

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[2] That section states that the term "United States" when used in a territorial sense applies to the territories except the Canal Zone.

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